

L. KIRK NURMI #020900
LAW OFFICES OF L. KIRK NURMI
2314 East Osborn
Phoenix, Arizona 85016
602-285-6947
nurmilaw@gmail.com

Jennifer L. Willmott, #016826
WILLMOTT & ASSOCIATES, PLC
845 N. 6th Avenue
Phoenix, Arizona 85003
Tel (602) 344-0034
Email: jwillmott@willmottlaw.com

Attorneys for Defendant **ARIAS**

SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA

Plaintiff,

vs.

JODI ANN ARIAS,

Defendant.

No. CR 2008-031021-001DT

**DEFENDANT'S; MOTION TO
PRECLUDE OR LIMIT LIVE
MEDIA COVERAGE OF
SENTENCING PHASE RETRIAL**

(Hon. Sherry Stephens)

COMES NOW Ms. Arias, by and through counsel undersigned, and asks this court to preclude or limit live media coverage of her sentencing phase retrial by asking that the media be precluded from filming the proceedings altogether or in the alternative that should filming occur that this Court order that all media outlets be precluded from broadcasting or otherwise disseminating any video of the live proceedings until after the

entire trial concludes. Ms. Arias makes this motion based on the dictates of Supreme Court Rule 122 and out of concern that the recording and/or broadcasting of her retrial will interfere with her right to a fair trial pursuant to the to the 5th, 6th and 14th Amendments of the United States Constitution As well as Article 2 Sections 4, 15, 23 and 24 of the Arizona Constitution. The attached Memorandum further explains this position.

MEMORANDUM IN SUPPORT

I. RELEVANT FACTS

Ms. Arias has been convicted of First Degree Murder. The State seems intent on seeking the death penalty against Ms. Arias. Thus, the retrial of her sentencing phase will determine if she is sentenced to life in prison or is to be killed by the hand of the State.

In advance of her first trial Ms. Arias sought to preclude live media coverage of her trial. This court denied Ms. Arias' request and thus, all phases of her trial were filmed and displayed to the world in real time.

During these proceedings, witnesses for the defense were threatened on a daily basis or sometimes on a real time basis based on the testimony they provided. Counsel for Ms. Arias also received such threats based on people's perceptions of what they were viewing in real time. The effects of these threats were most apparent when the proceedings against Ms. Arias reached the sentencing phase. Two key mitigation witnesses, Alyce LaViolette and Patricia Womack, refused to participate based on the threats and harassment each received. Meaning they had such severe concerns for their personal safety that they were

unwilling to take the stand and offer support to Ms. Arias even when Ms. Arias' life was at stake. Of additional note in this regard is that time has not altered the position of either Ms. Womack or Ms. LaViolette. Neither are willing to participate in any future proceedings.

II. RELEVANT LAW AND ARGUMENT

A. DEATH IS DIFFERENT AND THUS A HIGHER LEVEL OF PROTECTION MUST BE GIVEN TO MS. ARIAS DURING HER UPCOMING SENTENCING PHASE

As it is often said "death is different" in that a sentence of death than a sentence of imprisonment, however long, as a sentence of death is irrevocable once imposed. *Woodson v. North Carolina* 428 U.S. 280 (1976). Due to this fact the United States Supreme Court has stated that "the balance of conflicting interests must be weighed most heavily favored in the protections afforded a defendant in the Bill of Rights. *Ried v. Covert* 354 U.S. 1 (1957). Ms. Arias points this out at the onset of her argument because it is important to note that the case law cited above is truly the backdrop from which all the assertions she is making herein emanate. Furthermore, as will be described below these considerations are of much more prominence than the interests that any media outlet may have in exploiting these proceedings for profit.

B. SUPREME COURT RULE 122 PROVIDES THIS COURT WITH THE DISCRETION TO PLACE LIMITATIONS UPON MEDIA COVERAGE

When issues related to media coverage arise, Rule 122(a) gives this court broad discretion to act as it sees fit under the circumstances but it does give guidance to this court in that it requires that this court consider;

- (i) The impact of coverage upon the right of any party to a fair trial;
- (ii) The impact of coverage upon the right of privacy of any party or witness;
- (iii) The impact of coverage upon the safety and well-being of any party, witness or juror;
- (iv) The likelihood that coverage would distract participants or would detract from the dignity of the proceedings;
- (v) The adequacy of the physical facilities of the court for coverage;
- (vi) The timeliness of the request pursuant to subsection (f) of this Rule; and
- (vii) Any other factor affecting the fair administration of justice.

Beginning with subsection (i) in some ways while it may seem impossible to quantify the effect the media coverage had on the previous proceedings against Ms. Arias it seems beyond legitimate dispute that such coverage had a negative effect in that witnesses intimidated while the testimony was ongoing. Although this court gave witnesses the option of not having their faces filmed, real time dissemination of the names of all witnesses and their testimony impacts their privacy in that each and every witness can easily be found and contacted while the proceedings are ongoing, giving rise to considerations found in section (ii).

As it relates to subsection (iii) ample evidence, some of which is under seal, shows that nearly every witness who spoke on Ms. Arias' behalf was threatened to some degree and that counsel for Ms. Arias was also threatened. In this regard, Ms. Arias would point out that these threats were serious and included a bomb threat made against the entire courthouse on or about May 10, 2013 and while certainly the arrest of David Lee

Simpson occurred after the initial proceeding were concluded, Mr. Simpson's threats against media members, at a time when he had the means to carry out his threats exemplifies the kind of fervor that live media coverage of this trial generated. As Section (iii) of Rule 122 recognizes, no participant should have their health or safety threatened for doing their job, nor for that matter should a member of the media be threatened for commenting on the case. The fact that these types of threats are occurring and that attempts to actualize these threats could be made during any retrial; Ms. Arias takes the position that restricting coverage will at the very least minimize the fervor that has seemingly motivated these threats.

As she did earlier, Ms. Arias would concede that how the aforementioned threats distracted trial participants would be impossible to quantify but Supreme Court Rule 122 (iv) does not require either Ms. Arias or this court to make such a calculation instead this court need only assess "the likelihood that coverage would distract participants or would detract from the dignity of the proceedings" In this regard it is beyond dispute that the participants were effected by media coverage of the former trial, as evidenced by the unwillingness of Ms. LaViolette's return.

Subsection (v) of Rule 122 asks this court to consider the adequacy of the physical facilities of the court for coverage. Should this court not preclude media coverage altogether as is Ms. Arias' primary assertion she argues in the alternative assuming that the trial will remain in the same court room. In this regard, Ms. Arias would point out that her trial courtroom had a "media room" that contained very little media but instead

served as more of a “home base” for the several cameras and microphones that littered the courtroom. Thus, she is not contesting the adequacy of the facilities per se, but, is instead asserting that the facilities are inadequate when the instrumentalities associated with live multimedia coverage are not contained in the designated area but instead littered throughout the court room. Ms. Arias stands moot on the remaining factors and instead relies on her arguments related to the first five factors.

Consistent with Supreme Court Rule 122, Ms. Arias would point out that this court has the inherent power to preserve order and decorum in the courtroom, and to protect the rights of the parties and witnesses. *KPNX Broadcasting Company v Superior Court*, 139 Ariz. 246 (1984).

C. FIRST AMENDMENT ARGUMENTS ARE UNPERSUASIVE

In prior proceeding this Court permitted media outlets such as CNN, CBS, HLN, PNI and KPNX (henceforth referred to as media) to intervene as to issues related to their combined coverage, thus, Ms. Arias anticipates that the media will once again object to any limitations on their coverage and do so by wrapping their interests under the cloak of the First Amendment, however, as discussed below, these claims of public access are better viewed for what they are, the desire to economically exploit these proceedings.

As an initial matter, Ms. Arias would concede that Article II §11 of the Arizona Constitution dictates that “[j]ustice in all cases must be administered openly” however, Ms. Arias is unaware of any case law interpreting this provision to preclude any

restrictions on media access. Furthermore, while well-established Supreme Court case law such as *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980) and *Press-Enterpirises Co. v. Superior Court* 478 U.S. 1 (1986) dictate that the press has a right to access and/or attend criminal trials these authorities do not dictate that the press can do as they please. Instead, all these authorities dictate that the media can attend and/or access the proceedings. In this regard, Ms. Arias is not arguing that the media cannot attend or that that courthouse doors should be locked. Rather the restrictions should be placed on the filming of her trial and/or the dissemination of the video footage.

In the past, the media has cited *Mitchell v. Superior Court* 142 Ariz. 332, 852 P.2d 1194 (1984) to assert that the concerns Ms. Arias raises herein are merely speculative and thus she cannot demonstrate to this court that any restrictions are warranted. However, we have now seen the harassment and threats to Ms. Arias' witnesses and ultimate destruction of her mitigation case when the media was given free reign. In resolving this issue Ms. Arias would refer the court to the Data Disc that serves as an exhibit to this motion as the summary of the various media reports demonstrates how the free reign given the media has been at the expense of Ms. Arias trial rights for her upcoming trial. Furthermore, Ms. Arias would be remiss if she did not point out that the First Amendment arguments likely to be advanced in opposition to this motion are not truly draped in the Constitution, but instead, the almighty dollar. By way of example as to what is on the Data Disc that serves as an exhibit to this motion the below data shows the

kind of dollars referenced above. The figures below represent the cost of a 30 second ad buy when Arias related programming was being aired.

January 2, 2013

7:30 am ABC, \$60,000

6:00pm HLN, \$8,266

7:00pm HLN, \$8,163

January 3, 2013

7:30am, ABC, \$60,000

9:00pm Fox, \$17,557

January 4, 2013

7:30am, ABC, \$60,000

6:00pm, HLN, \$8,266

7:30pm HLN, \$8,163

March 1, 2013

7:30am NBC, \$73,000

9:30pm CNN, \$20,316

March 3, 2013

8:00pm CNN, \$14,093

9:00pm CNN, \$20,316

March 15, 2013

7:30pm CNN \$17,344

9:00pm CNN \$20,316

March 27, 2013

7:30pm HLN, \$8,163

8:00pm HLN \$8,256

April 12, 2013

6:00pm HLN \$8,266
6:30pm HLN \$8,266
10:30pm HLN \$4,735

April 19, 2013

7:30pm HLN \$8,163
10:00pm HLN \$4,735

May 1, 2013

7:30am ABC \$60,000
6:00pm HLN \$8,266

May 17, 2013

6:30pm HLN \$8,266
8:00pm HLN \$8,266

Perhaps the most compelling argument that the First Amendment right of access line of cases is not dispositive of the issue at hand is that the motivation behind the constitutional guarantee of a public trial is to ensure that an accused is fairly dealt with and not unjustly condemned. Estes v. Texas 381 U.S. 532 (1965).

D. THE PRESENCE OF CAMERAS ON THE COURTROOM AND LIVE DISSEMINATION OF VIDEO FEEDS FROM THE TRIAL WILL INTERFERE WITH MS. ARIAS' RIGHT TO A FAIR TRIAL DUE HER PURSUANT TO THE TO THE 5TH, 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 2 SECTIONS 4, 15, 23 AND 24 OF THE ARIZONA CONSTITUTION.

Ms. Arias asks this court to be cognizant of the fact the she has an absolute right to present mitigation evidence at trial and that in a capital case, every effort must be made to

guarantee a defendant the right to present all relevant mitigation evidence to the jury that will decide whether he lives or dies. *Wiggins*, 539 U.S. 510 (2003) at 524, *citing* ABA GUIDELINES. Thus, this court must give serious consideration to how the filming of her trial and/or the immediate dissemination will affect her unfettered ability to present mitigating evidence.

That is because the capital sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence, regardless of whether that evidence has a specific nexus to the crime committed. Instead, the sentencer in a capital case must consider in mitigation anything in the life of the defendant that might mitigate against a sentence of death. *Smith v. Texas*, 543 U.S. 37, 43-45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-86 (2004); *see also* U.S. Const., Amends VIII & XIV; Ariz. Const., Art. 2, § 15. Mitigating circumstances are, “circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability.” *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977).

Of further note is that preclusion of mitigation evidence constitutes a violation of the Due Process Clause of the United States Constitution. *Green v. Georgia*, 442 U.S. 95, 97 (1979); U.S. Const., Amend. XIV; *see also* Ariz. Const., Art. 2, § 4.

In Ms. Arias’ case, the Defense mitigation investigation was completed to a practical extent and she was ready to present said evidence at trial up until the point in time when mitigation witnesses felt too intimidated to come forward solely because of the threats that were made against them by those who were consuming the live coverage

or those whose anger arose from the pro-prosecution propaganda being displayed to the world.

III. CONCLUSION

Pursuant to the dictates of Supreme Court Rule 122 and the rights due Ms. Arias pursuant to the to the 5th, 6th and 14th Amendments of the United States Constitution as well as Article 2 Sections 4, 15, 23 and 24 of the Arizona Constitution. Ms. Arias, for the reasons mentioned herein, hereby requests that the court reconsider its ruling and deny the request made by CBS to record and/or televise the proceedings.

RESPECTFULLY SUBMITTED, this 22nd day of August, 2013

LAW OFFICES OF L. KIRK NURMI

By: /s/ L. Kirk Nurmi
L. Kirk Nurmi
Attorney at Law
Attorney for the Defendant

Copy of the forgoing E-filed/
Electronically Delivered this 22nd day of
August, 2013, to:

Honorable Sherry Stephens
Judge of the Superior Court
175 W. Madison
Phoenix, AZ 85003

Juan Martinez
Deputy County Attorney
301 W. Jefferson
Phoenix, AZ 85003

David Bodney
201 E. Washington St.
Ste 1600
Phoenix, AZ 85004

By ~~/s/L. Kirk Nurmi~~ _____
L. Kirk Nurmi
Attorney for the Defendant